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In The

Supreme Court of the United States

October Term, 1976

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No. 76-

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J. JAMES EXON, Governor of the State of Nebraska, and ALLEN J. BEERMANN, Secretary of State of the State of Nebraska,

Appellants,

vs.

EUGENE J. McCARTHY, HARRY G. MENDELSON, EDWIN H. GARRISON, JR., PAT L. WATKINS and MALCOLM W. PAINE,

o

Appeal from the United States District Court for the District of Nebraska

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JURISDICTIONAL STATEMENT

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INDEX

Pages

Jurisdictional Statement 1

Opinion Below 2

Jurisdiction 2

Statutes Involved 3

Questions Presented 4

Statement of the Case 4

The Questions Presented are Substantial:

I. The plaintiffs sought relief from the sovereign State of Nebraska contrary to the Eleventh Amendment of the Constitution of the United States. 7

II. The court below did not have the authority to grant relief in the nature of mandamus against the defendants. 12

III. The court below lacked subject matter jurisdiction to grant the relief prayed for against the defendants. 14

IV. Abstention by the court below would have been appropriate in the case at bar. 16

Conclusion 20

Appendix:

Memorandum of Decision A-1

Judgment A-5

Statutes A-7

CASES CITED

Pages

Allen v. Board of Elections, 393 U. S. 544, 22 L. Ed. 2d 1, 89 S. Ct. 817 (1969) 2

Barr v. United States, 478 F. 2d 1152 (10th Cir. 1973), *cert. denied,* 414 U. S. 910, 38 L. Ed. 2d 148, 94 S. Ct. 233 16

Burford v. Sun Oil, 319 U. S. 315, 87 L. Ed. 1424, 63 S. Ct. 1098 (1943) 17

Chandler v. O'Bryan, 445 F. 2d 1045 (10th Cir. 1971), *cert. denied,* 405 U. S. 964, 31 L. Ed. 2d 241, 92 S. Ct. 1176, *rehearing denied,* 405 U. S. 1049, 31 L. Ed. 2d 592, 92 S. Ct. 1310 16

Chisholm v. Georgia, 2 Dall. 419, 1 L. Ed. 440 (1793) 7

City of Kenosha v. Bruno, 412 U. S. 507, 37 L. Ed. 2d 109, 93 S. Ct. 2222 (1973) 15

Clay v. Sun Insurance Office Ltd., 363 U. S. 207, 4 L. Ed. 2d 1170, 80 S. Ct. 1222 (1960) 17, 19

Duke v. State of Texas, 477 F. 2d 244 (5th Cir. 1973) 18

Edelman v. Jordan, 415 U. S. 651, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974) 7, 8

Ex parte State of New York, 256 U. S. 490, 65 L. Ed. 1057, 41 S. Ct. 588 (1921) 8

Ex parte Young, 209 U. S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908) 12

CASES CITED—Continued

Pages

Fenner v. Boykin, 271 U. S. 240, 70 L. Ed. 927, 46 S. Ct. 492 (1926) 18

Fitts v. McGhee, 172 U. S. 516, 43 L. Ed. 535, 19 S. Ct. 269 (1899) 8

Great Northern Life Ins. Co. v. Read, 322 U. S. 47, 88 L. Ed. 1122, 64 S. Ct. 873 (1944) 9

Huffman v. Pursue, 420 U. S. 592, 43 L. Ed. 2d 482, 95 S. Ct. 1200 (1975) 17, 18

Johnson v. Interstate Power Company, 187 F. Supp. 36 (D. S. D. 1960) 13, 14

Larson v. Domestic and Foreign Commerce Corp., 337 U. S. 682, 93 L. Ed. 1628, 69 S. Ct. 1457 (1949) 10

Lynch v. Snepp, 472 F. 2d 769 (4th Cir. 1973) 19

Minnesota State Senate v. Beens, 406 U. S. 187, 32 L. Ed. 2d 1, 92 S. Ct. 1477 (1972) 2

Moor v. Alameda County, 411 U. S. 693, 36 L. Ed. 2d 596, 93 S. Ct. 1785 (1973) 15

Railroad Commission of Texas v. Pullman Company, 312 U. S. 496, 85 L. Ed. 971, 61 S. Ct. 643 (1941) 17

Scheuer v. Rhodes, 416 U. S. 232, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974) 8

Stern v. Southchester Tube Co., 390 U. S. 606, 20 L. Ed. 2d 177, 88 S. Ct. 1332 (1968) 12

CASES CITED—Continued

	Pages
Tilley Lamp Company v. Thacker, 454 F. 2d 805 (5th Cir. 1972)	16
Volkswagen de Puerto Rico, Inc. v. Puerto Rico Labor Relations Board, 454 F. 2d 38 (1st Cir. 1972)	16
Younger v. Harris, 401 U. S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971)	17, 18
Zemel v. Rusk, 381 U. S. 1, 14 L. Ed. 2d 179, 85 S. Ct. 1271 (1965)	2

STATUTES CITED

Section 25-21,149, R. R. S. 1943 (Reissue 1975)	19
Section 32-4,108, R. R. S. 1943 (Reissue 1974)	3
Section 32-504, R. S. Supp. 1976	3
Section 32-556, R. R. S. 1943 (Reissue 1974)	3
Section 32-561, R. R. S. 1943 (Reissue 1974)	3
28 U. S. C. § 1343	2, 3, 14, 15
28 U. S. C. § 2201	2, 3, 14, 15
28 U. S. C. § 2281	2, 3, 14, 16
28 U. S. C. § 2284	2, 3, 14, 16
42 U. S. C. § 1983	2, 3, 14, 15
42 U. S. C. § 1985	2, 3, 14

CONSTITUTION CITED

	Pages
Article II, Section 1, Constitution of the United States	A-2
Eleventh Amendment, Constitution of the United States	7, 8, 9, 11
First Amendment, Constitution of the United States	A-2
Fourteenth Amendment, Constitution of the United States	A-2
Twelfth Amendment, Constitution of the United States	A-2

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No. 76-

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Appellants,

vs.

EUGENE J. McCARTHY, HARRY G. MENDELSON, EDWIN H. GARRISON, JR., PAT L. WATKINS and MALCOLM W. PAINE,

Appeal from the United States District Court for the District of Nebraska

JURISDICTIONAL STATEMENT

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Appellants appeal from the judgment of the United States District Court for the District of Nebraska sitting as a three judge court entered on September 1, 1976, denying appellants' motion to dismiss filed August 26, 1976 and granting certain other relief and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The memorandum opinion of the three judge court is not reported. Copies of the memorandum opinion and judgment are attached and made a part hereto as Appendix A and Appendix B.

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JURISDICTION

This action was initially alleged to have been brought pursuant to Title 28, United States Code, Section 1343 (3) and (4); Title 28, United States Code, Sections 2201, 2281 and 2284 and Title 42, United States Code, Sections 1983 and 1985. The judgment of the three judge district court was entered on September 1, 1976 and notice of appeal was filed in the United States District Court for the District of Nebraska on September 17, 1976. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1253. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case. *Minnesota State Senate v. Beens,* 406 U. S. 187, 32 L. Ed. 2d 1, 92 S. Ct. 1477 (1972); *Allen v. Board of Elections,* 393 U. S. 544, 22 L. Ed. 2d 1, 89 S Ct. 817 (1969); *Zemel v. Rusk,* 381 U. S. 1, 14 L. Ed. 2d 179, 85 S. Ct. 1271 (1965).

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STATUTES INVOLVED

The constitutional validity of the following Nebraska Statutes were challenged:

Section 32-504, R. S. Supp. 1976,

Section 32-556, R. R. S. 1943 (Reissue 1974),

Section 32-561, R. R. S. 1943 (Reissue 1974), and

Section 32-4,108, R. R. S. 1943 (Reissue 1974).

The following United States Statutes were relied upon for jurisdiction in the court below:

Title 28, United States Code, Section 1343(3) and (4) (62 Stat. 932 as amended by 68 Stat. 1241 as further amended by 71 Stat. 637),

Title 28, United States Code, Section 2201 (62 Stat. 964 as amended by 63 Stat. 105 as amended by 68 Stat. 890 and as further amended by 72 Stat. 349),

Title 28, United States Code, Section 2281 (62 Stat. 968),

Title 28, United States Code, Section 2284 (62 Stat. 968 as amended by 74 Stat. 201),

Title 42, United States Code, Section 1983 (17 Stat. 13), and

Title 42, United States Code, Section 1985 (12 Stat. 284 as amended by 17 Stat. 13).

The above referenced statutes are set forth in Appendix C hereto.

———o———

QUESTIONS PRESENTED

The three judge district court overruled the appellants' motion to dismiss filed at the outset of the proceedings below. The questions presented for review are therefore:

(1) Whether the motion to dismiss should have been granted in that the plaintiffs' petition sought relief from the sovereign State of Nebraska contrary to the Eleventh Amendment to the Constitution of the United States.

(2) Whether the motion to dismiss should have been granted in that the court below did not have the authority to grant relief in the nature of mandamus against the appellants.

(3) Whether the motion to dismiss should have been granted in that the court below lacked subject matter jurisdiction to grant the relief prayed for against the appellants.

(4) Whether abstention by the court below would have been appropriate under the circumstances presented.

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STATEMENT OF THE CASE

On August 11, 1976, this action was filed by Eugene J. McCarthy, Harry G. Mendelson, Edwin H. Garrison, Jr., Pat L. Watkins and Malcolm W. Paine, seeking certain declaratory and mandatory injunctive relief.

Plaintiff McCarthy contended that the State of Nebraska's failure to provide a means whereby an independent candidate for President of the United States might obtain placement on the Nebraska General Election Presidential Ballot unconstitutionally deprived him of his right to electorial consideration by the voters of the State of Nebraska.

Plaintiffs Mendelson and Garrison alleged that they were unconstitutionally prevented from being appointed on behalf of plaintiff McCarthy as Nebraska Presidential Electors. Plaintiffs Watkins and Paine alleged that plaintiff McCarthy's inability to obtain ballot placement deprived them of their right to cast a vote for the candidate of their choice.

The defendants named in the action were the Honorable J. James Exon, Governor of the State of Nebraska and the Honorable Allen J. Beermann, Secretary of State of the State of Nebraska.

On August 24, 1976, petitions were tendered to the Secretary of State of the State of Nebraska on behalf of plaintiffs Garrison and Mendelson and three other persons not named as plaintiffs requesting that the five named persons on the petition be placed on the official general election ballot as candidates for the Office of Presidential Elector, committed to plaintiff Eugene J. McCarthy. Nebraska has no such position selected by popular vote at the General Election. These petitions contained two thousand eight hundred one signatures.

By letters dated August 24, 1976, the Secretary of State of the State of Nebraska notified the various persons named on the petition as candidates for the Office of Presidential Elector that he had no authority under

Nebraska law to officially accept and file the various pages of the petitions, but that they had been stamped "received" and were being held for custodial purposes only.

On August 26, 1976, the defendants filed a motion to dismiss contending that the court lacked jurisdiction to hear this matter. After seeking leave of the court, the plaintiffs on August 30, 1976, filed an amended complaint.

On August 31, 1976, a hearing was held before the three judge court at which time the defendants sought and received permission to file an answer *instanter* and orally renewed their motion to dismiss the amended complaint. Certain stipulated evidence was offered and received and arguments heard on the defendants' motion to dismiss and on the merits. On September 1, 1976, judgment was entered denying defendants' motion to dismiss and generally granting the relief sought.

The petitions were found to contain in excess of two thousand valid signatures and the Secretary of State found that this constituted a satisfactory level of community support, such standard having been set forth by the court, and on September 7, 1976, certified the names of Eugene J. McCarthy and Phyllis J. Paine as independent candidates for President and Vice-President onto the 1976 Nebraska General Election Presidential Ballot.

Thereafter, this appeal was filed with the United States District Court for the District of Nebraska on September 17, 1976.

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THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I.

The plaintiffs sought relief from the sovereign State of Nebraska contrary to the Eleventh Amendment to the Constitution of the United States.

In the August 1792 Term of this court, two citizens of the State of South Carolina brought suit against the State of Georgia. This prompted the short-lived but momentous decision in *Chisholm v. Georgia,* 2 Dall. 419, 1 L. Ed. 440 (1793). In that case this court held that a state was liable to suit by a citizen of another state or of a foreign country. Public reaction to the decision was strong and adverse, and in 1798 the Eleventh Amendment to the Constitution of the United States was officially announced by President John Adams to nullify the decision in *Chisholm v. Georgia, supra.* Unchanged since that time, the Eleventh Amendment provides:

> **"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."**

While the amendment, by its terms, only prohibits suits against a state in a federal court by citizens of another state or by aliens, it has consistently been interpreted to include a much broader scope. This court in *Edelman v. Jordan,* 415 U. S. 651, 39 L. Ed. 2d 662, 94 S. Ct. 1347 at page 662, stated as follows:

> **"While the Amendment by its terms does not bar suits against a State by its own citizens, this Court has consistently held that an unconsenting State is im-**

mune from her own citizens as well as by citizens of another State. Hans v. Louisiana, 134 US 1, 33 L Ed 842, 10 S Ct 504 (1890); Duhne v. New Jersey, 251 US 311, 64 L Ed 280, 40 S Ct 154 (1920); Great Northern Life Insurance Co. v. Read, 322 US 47, 88 L Ed 1121, 64 S Ct 873 (1944); Parden v. Terminal R. Co., 377 US 184, 12 L Ed 2d 233, 84 S Ct 1207 (1964); Employees v. Department of Public Health and Welfare, 411 US 279, 36 L Ed 2d 251, 93 S Ct 1614 (1973). . . ."

It is now clear that the sovereign immunity rationale of the Eleventh Amendment prohibits not only suits against a state by citizens of another state, but also prohibits suits against a state by citizens of the same state in federal court. *Edelman v. Jordan, supra,* also makes it clear that the Eleventh Amendment sovereign immunity is in the nature of a jurisdictional bar against the federal court.

A state's sovereign immunity under the Eleventh Amendment is not limited to cases in which it is a party of record or a nominal party, and extends to suits against the Governor or other officers of the state in their official capacity, and to suits against an agency or other instrumentality of the state government when the state is the real party in interest. *Scheuer v. Rhodes,* 416 U. S. 232, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974); *Edelman v. Jordan, supra; Ex parte State of New York,* 256 U. S. 490, 65 L. Ed. 1057, 41 S. Ct. 588 (1921); *Fitts v. McGhee,* 172 U. S. 516, 43 L. Ed. 535, 19 S. Ct. 269 (1899). Whether a particular action constitutes a suit against a state within the prohibition of the Eleventh Amendment is generally determined not by the identity of the parties named as defendants on the record, but rather by the essential character of the proceedings, the relief requested, and the

possible result of the judgment or decree which may be entered.

In the case at bar, it is clear that by naming the Governor and the Secretary of State as defendants the plaintiffs essentially made the State of Nebraska a party without its consent in violation of the Eleventh Amendment's sovereign immunity.

The plaintiffs claimed that the failure of Nebraska's law to contain statutory provisions for the petitioning of electoral voters and independent presidential candidates onto the Nebraska General Election Ballot has denied them a constitutionally protected right. These officers were not refusing or neglecting to perform a statutory duty. There existed *no authority* for these officers to act. In reality, therefore, the plaintiffs brought suit against the sovereign State of Nebraska because of the fact that Nebraska did not provide for a means whereby presidential electors could be selected by petition and whereby an independent presidential candidate could be placed on the General Election Ballot by petition. This, it is contended, is in direct violation of the Eleventh Amendment to the United States Constitution. Additionally it is argued that the plaintiffs asked the court to control the State of Nebraska in the performance of its political duties which is also contrary to the United States Constitution. *Great Northern Life Ins. Co. v. Read,* 322 U. S. 47, 88 L. Ed. 1122, 64 S. Ct. 873 (1944).

Generally, with respect to actions brought against state officers, it has been stated in 72 Am. Jur. 2d, States, § 108, as follows:

". . . The rule is now well settled that a suit against an officer of a state as representing the state in action and liability, where the state, although not a party to the record, is the real party against which relief is sought, and where a judgment for the plaintiff, although nominally against the officer as an individual, could operate to control the action of the state or subject it to liability, is to be deemed a suit against the state, and is not maintainable unless the state has consented to be sued. On the other hand, the mere fact that a suit is against a state officer does not mean that the suit is to be considered as one against the state within the rule of immunity of the state from suit without its consent. The difficult problem is to determine when the suit is in reality a suit against the state, although nominally against an officer, and when it is in reality against the officer named as defendant, and in determining this, not so much depends upon the character of the defendant's office as upon the nature of the suit or the relief demanded. . . ."

This court in *Larson v. Domestic and Foreign Commerce Corp.*, 377 U. S. 682, 93 L. Ed. 1628, 69 S. Ct. 1457 (1949), at page 687, summarized certain of the factors which should be considered in determining whether a suit against an officer is in reality a suit against a sovereign:

> "If the denomination of the party defendant by the plaintiff were the sole test of whether a suit was against the officer individually or against his principal, the sovereign, our task would be easy. Our decision then would be that the United States is not being sued here because it is not named as a party. This would be simple and would not leave room for controversy. But controversy there has been, in this field above all others, because it has long been established that the crucial question is whether the relief sought in a suit nominally addressed to the officer is relief

against the sovereign. In a suit against the officer to recover damages for the agent's personal actions that question is easily answered. The judgment sought will not require action by the sovereign or disturb the sovereign's property. There is, therefore, no jurisdictional difficulty. The question becomes difficult and the area of controversy is entered when the suit is not one for damages but for specific relief: i. e., the recovery of specific property or monies, ejectment from land, or injunction either directing or restraining the defendant officer's actions. In each such case the question is directly posed as to whether, by obtaining relief against the officer, relief will not, in effect, be obtained against the sovereign. For the sovereign can act only through agents and, when an agent's actions are restrained, the sovereign itself may, through him, be restrained. As indicated, this question does not arise because of any distinction between law and equity. It arises whenever suit is brought against an officer of the sovereign in which the relief sought from him is not compensation for an alleged wrong, but, rather, the prevention or discontinuance, *in rem*, of the wrong. In each such case the compulsion, which the court is asked to impose, may be compulsion against the sovereign although nominally directed against the individual officer. If it is, then the suit is barred, not because it is, a suit against an officer of the Government, but because it is, in substance, a suit against the Government over which the court, in the absence of consent, has no jurisdiction."

Applying this test, it is clear that because the plaintiffs did not ask for compensation for alleged wrongs but rather, asked the court below to compel action by the Secretary of State and the Governor of the State of Nebraska, that the plaintiffs in reality sought relief from the sovereign State of Nebraska in violation of the Eleventh Amendment to the Constitution of the United States.

In *Ex parte Young,* 209 U. S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908), this court defined the situations in which an individual may sue a state official. In so doing on page 158 this court stated as follows:

> ". . . There is no doubt that the court cannot control the exercise of the discretion of an officer. It can only direct affirmative action where the officer having some duty to perform not involving discretion, but merely ministerial in its nature, refuses or neglects to take such action. In that case the court can direct the defendant to perform this merely ministerial duty. . . ."

Here the question does not even involve an assessment of the nature of a duty. No statutory duty exists. If the court below could not direct such parties as were named herein to perform discretionary duties but only clearly stated ministerial duties, it is concluded that it could not direct these individuals to perform nonexistent duties.

In light of the argument presented above, it is concluded that in reality this was an action against the State of Nebraska contrary to the express provisions of the Eleventh Amendment to the United States Constitution and should therefore have been dismissed.

II.

The court below did not have the authority to grant relief in the nature of mandamus against the defendants.

The case of *Stern v. Southchester Tube Co.,* 390 U. S. 606, 20 L. Ed. 2d 177, 88 S. Ct. 1332 (1968), clarifies one distinction between the common law writ of mandamus and the mandatory injunction which the plaintiffs requested,

i. e., a writ of mandamus is a legal remedy while an injunction, whether mandatory or prohibitive, is an equitable remedy. Although the technical distinctions between law and equity have been abolished in both the federal court system and the State of Nebraska's court system, by reason of the nature of equitable remedies it still is generally required that before such a remedy is granted it must be shown that there are no remedies at law available. Plaintiffs have failed to do this. In fact, a remedy was available to the plaintiffs in this action in the form of a declaratory judgment issued in the state court system of Nebraska. Therefore, because there is an adequate legal remedy available to the plaintiffs in the court system of the State of Nebraska, the appellants contend that the court below should not have issued any relief in the nature of a mandatory injunction.

A second distinction between the writ of mandamus and the mandatory injunction exists. That distinction is that a writ of mandamus is used to compel a public official to perform his ministerial duty while a mandatory injunction is used to compel some action of someone other than a public official. See *Johnson v. Interstate Power Company,* 187 F. Supp. 36 (D. S. D. 1960). This case enunciates this distinction and provides a list of authorities in support of the distinction. It is clear, therefore, that although the plaintiffs termed the relief which they sought as a mandatory injunction, that in actuality they sought relief in the nature of mandamus because they asked the court below to compel public officials to perform some alleged duty. Numerous cases have held that a federal district court has power to issue a mandatory

injunction but lacks the power to issue relief in the nature of a writ of mandamus in an original proceeding. See, *Johnson v. Interstate Power Company, supra,* and the cases cited therein. In *Johnson* the plaintiff was asking the federal district court to compel a public power company to take some affirmative action. The court held that the plaintiff was asking for relief in the nature of mandamus rather than mandatory injunction and that therefore the court did not have the power to grant the relief for which they prayed.

In the case at bar the plaintiffs asked the court below to compel certain public officials to perform an alleged duty which rendered their requested relief to have been in the nature of mandamus rather than in the nature of mandatory injunction. The appellants contend, therefore, that the court below, like the district court in *Johnson,* had no power to issue the relief prayed for by the plaintiffs.

III.

The court below lacked subject matter jurisdiction to grant the relief prayed for against the defendants.

The appellants contend that the court below did not have subject matter jurisdiction over any claim asserted by the plaintiffs against them. The plaintiffs alleged subject matter jurisdiction under 28 U. S. C. § 1343 (3) and (4) and also under the authority of 42 U. S. C. §§ 1983 and 1985, 28 U. S. C. §§ 2281 and 2284, and 28 U. S. C. § 2201. An analysis of these sections demonstrates that the plaintiffs could not attain subject matter jurisdiction over any claim asserted against the appellants.

The plaintiffs alleged jurisdiction under 28 U. S. C. § 1343 (3) and (4). Those subsections provide as follows:

> "(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
>
> "(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

In order that a lawsuit be actionable under § 1343, that lawsuit must be a "civil action *authorized by law*", (emphasis added), according to § 1343. The plaintiffs first contended that 42 U. S. C. § 1983 authorized this lawsuit. However, it is a well established rule that § 1983 only authorizes lawsuits against persons. See, *City of Kenosha v. Bruno,* 412 U. S. 507, 37 L. Ed. 2d 109, 93 S. Ct. 2222 (1973); *Moor v. Alameda County,* 411 U. S. 693, 36 L. Ed. 2d 596, 93 S. Ct. 1785 (1973). As has been contended, this action was in reality an action against the State of Nebraska and not an action against an individual person. Therefore, 42 U. S. C. § 1983 did not provide authorization for a civil suit against the State of Nebraska. It is additionally contended that the conspiracy provisions of § 1985 similarly failed to grant in and of themselves subject matter jurisdiction for such an action.

The plaintiffs apparently also relied upon 28 U. S. C. § 2201 as authority for the jurisdiction of the court below. It is a well settled principle of law, however, that this sec-

tion does not confer jurisdiction upon the federal courts but rather the ability to impart a declaratory judgment under this section must rest upon jurisdiction independent of that section. *Barr v. United States,* 478 F. 2d 1152 (10th Cir. 1973), *cert. denied,* 414 U. S. 910, 38 L. Ed. 2d 148, 94 S. Ct. 233; *Tilley Lamp Company v. Thacker,* 454 F. 2d 805 (5th Cir. 1972); *Volkswagen de Puerto Rico, Inc. v. Puerto Rico Labor Relations Board,* 454 F. 2d 38 (1st Cir. 1972); *Chandler v. O'Bryan,* 445 F. 2d 1045 (10th Cir. 1971), *cert. denied,* 405 U. S. 964, 31 L. Ed. 2d 241, 92 S. Ct. 1176, *rehearing denied,* 405 U. S. 1049, 31 L. Ed. 2d 592, 92 S. Ct. 1310.

Finally, plaintiffs contended that jurisdiction was existent pursuant to 28 U. S. C. §§ 2281 and 2284. It is argued that these sections, as they existed prior to August 13, 1976, and as they existed at the time of the filing of this action, conferred no jurisdiction in and of themselves but merely provided a procedure under which certain disputes concerning the constitutionality of state statutes were to be resolved.

It is concluded that the court below was without subject matter jurisdiction to entertain this action or to grant the relief sought and the action should therefore have been dismissed.

IV.

Abstention by the court below would have been appropriate in the case at bar.

It is the contention of the appellants that the court below should have declined jurisdiction over this case for

the reason of comity between the federal government and the State of Nebraska and further for the reason that the plaintiffs herein did not avail themselves of nor exhaust available remedies under the laws of the State of Nebraska.

The concept of abstention by the federal courts has developed along several lines. The first has become generally known as the Pullman Doctrine inasmuch as this doctrine was set forth by this court in 1941 in *Railroad Commission of Texas v. Pullman Company,* 312 U. S. 496, 85 L. Ed. 971, 61 S. Ct. 643 (1941). A second doctrine has developed around the principle that the federal courts should refrain from exercising their jurisdiction in order to avoid needless conflict with the administration by the various states of their own affairs. *Burford v. Sun Oil,* 319 U. S. 315, 87 L. Ed. 1424, 63 S. Ct. 1098 (1943). A third basis of abstention is predicated on the assumption that the federal court should leave to the various states questions of the interpretation of those states' laws. *Clay v. Sun Insurance Office Ltd.,* 363 U. S. 207, 4 L. Ed. 2d 1170, 80 S. Ct. 1222 (1960). Finally, abstention has been justified as a means of relieving the caseload pressure on the federal courts. It is to the first of these doctrines that the appellants primarily direct this court's attention.

In 1971 this court decided the case of *Younger v. Harris,* 401 U. S. 31, 27 L. Ed. 2d 669, 91 S. Ct. 746, thereby clarifying years of uncertainty as to the applicability of the concept of abstention in criminal cases. Recently this court extended the principle of *Younger, supra,* in *Huffman v. Pursue,* 420 U. S. 592, 43 L. Ed. 2d 482, 95 S. Ct. 1200 (1975), to at least some civil cases while de-

clining to decide the broader question of whether the principles set down in *Younger, supra,* should be applied to all civil cases. This court did specifically state, however:

> "The seriousness of federal judicial interference with state civil functions has long been recognized by this court. We have consistently required that when federal courts are confronted with requests for such relief, they should abide by standards of restraint that go well beyond those of private equity jurisprudence."

This court further held, citing *Fenner v. Boykin,* 271 U. S. 240, 70 L. Ed. 927, 46 S. Ct. 492 (1926):

> "That no injunction ought to issue against officers of a state clothed with authority to enforce the law in question, unless in a case reasonably free from doubt and when necessary to prevent great and irreparable injury."

Prior to this court's decision in *Huffman, supra,* several courts of appeal considered the question of the applicability of *Younger, supra,* to civil cases. In *Duke v. State of Texas,* 477 F. 2d 244 (5th Cir. 1973), it was held that:

> "We iterate that the Younger principles of equity, comity and federalism apply to federal intervention in state 'civil' as well as 'criminal' proceedings. . . ."

The court in *Duke, supra,* further held that before a federal plaintiff can be granted relief he must demonstrate (1) that he will suffer irreparable injury, and (2) that he does not have an adequate remedy at law in the state courts. Under consideration here was a federal district court order enjoining the issuance and enforcement of a state court order prohibiting plaintiff's students from entering upon the campus of a Texas State University.

In *Lynch v. Snepp,* 472 F. 2d 769 (4th Cir. 1973), the Fourth Circuit held that even where the federal court had jurisdiction under the civil rights statute to grant relief, such action should not be taken without first considering the principles of equity, comity and federalism. Here the federal district court had granted a preliminary injunction against certain officers of the state government of North Carolina restraining them from enforcing a state court injunction which controlled access to certain public schools. Additionally, this court has held that where consideration by the state courts may render the constitutional question moot, abstention is frequently appropriate. *Clay v. Sun Insurance Office Ltd., supra.*

It is the argument of the appellants that adequate means existed within the state laws of Nebraska to enable the plaintiffs herein to seek relief without the necessity of the intervention of the federal courts. Declaratory relief existed pursuant to Neb. Rev. Stat. § 25-21,149, et seq. (Reissue 1975).

Appellants would conclude that the questions of the administration of the state election laws and the constitutionality thereof should at least initially be left to the state inasmuch as adequate state remedies exist and therefore in the interest of equity, comity and federalism, the appellants contend that the court below should have exercised restraint and adopted a policy of abstention with reference to the complaint filed therein.

CONCLUSION

For the foregoing reasons the appellants urge this court to note probable jurisdiction over this case, set the cause for plenary consideration, and reverse the judgment of the United States District Court for the District of Nebraska.

Respectfully submitted,

J. JAMES EXON, Governor of the State of Nebraska, and ALLEN J. BEERMANN, Secretary of State of the State of Nebraska, Appellants.

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APPENDIX A—MEMORANDUM

(Filed September 1, 1976)

CV76-L-166

In the United States District Court
for the District of Nebraska

EUGENE J. McCARTHY, et al.,

Plaintiffs,

vs.

THE HONORABLE J. JAMES EXON, et al.,

Defendants.

This matter came on for hearing on this 31st day of August, 1976, before a three-judge court seeking mandatory injunctive and declaratory relief by plaintiffs against J. James Exon and Allen J. Beermann as individuals. J. James Exon is the Governor of the State of Nebraska and Allen J. Beermann is the Secretary of State of the State of Nebraska. The plaintiffs assert jurisdiction under 28 U. S. C. § 1343 (3) (4), 28 U. S. C. § 2201, 28 U. S. C. § 2281, 28 U. S. C. § 2284, 42 U. S. C. § 1983, and 42 U. S. C. § 1985, and assert that the defendants have wrongfully and unconstitutionally barred Eugene J. McCarthy from electoral consideration as an independent candidate for the office of President of the United States by refusing to place the name of Eugene J. McCarthy on the electoral ballot for the general election for the office of the President of the United States to be held in November, 1976. The plaintiffs Harry G. Mendelson and Edwin H. Garrison allege that they have been barred from being appointed to serve as his presidential electors in the November, 1976, election in the event that the said Eugene J. McCarthy is elected in the State of Nebraska for the office of the President of the

United States. The parties allege in their complaint that the statutory provisions in Nebraska, to-wit, 32-504 (Supp. 1974), together with 32-556, 32-561, 32-4,108 and other related statutes are unconstitutional in that they violate Article II, Section 1 and Article VI of the Constitution of the United States and the First, Twelfth and Fourteenth Amendments thereto.

The defendants have filed a motion to dismiss for lack of jurisdiction, asserting *inter alia* the defense of sovereign immunity.

The motion to dismiss is overruled; the defendants have requested and leave is granted to file an answer to the complaint *instanter*.

The court finds that the statutory scheme in the State of Nebraska provides no method by which an independent candidate for the office of the President of the United States may appear on a ballot other than through certification by a political party. Under these circumstances, the court finds that the statutes of the State of Nebraska, as set forth above, are unconstitutional and in violation of the First and Fourteenth Amendments of the Constitution of the United States. See *Storer v. Brown, et al.*, 415 U. S. 724 (1974).

Notwithstanding the finding that the Nebraska statutes are constitutionally deficient in failing to provide a method by which an independent candidate for the office of the President of the United States may appear upon the electoral ballot within the State of Nebraska for the general election of that office, the court finds that the state nevertheless has a sufficient interest to assure itself

that the candidate is a serious contender, truly independent, and with a satisfactory level of community support. See *Storer v. Brown,* at 746-47.

In view of the lateness of the filing of the complaint nd the asserted necessity of having ballots for certification to be printed no later than September 8, 1976, this court concludes that the Secretary of State on or before September 8, 1976, should determine whether or not Eugene J. McCarthy has a satisfactory level of community support in order to appear upon a certified ballot. The parties by and through counsel have stipulated that Eugene J. McCarthy is a serious, independent candidate. In the absence of any controlling statute and in view of the emergency created by the time factor, the Secretary of State may take whatever steps are necessary to be assured that Eugene J. McCarthy has at this time a satisfactory level of community support. The court takes note that on or about Tuesday, August 24, 1976, a group presented to the Secretary of State, Allen J. Beermann, petitions with 2,981 signatures which requested that electors who support Eugene J. McCarthy be put on the November ballot. It is the court's understanding that these petitions are in the possession of Allen J. Beermann at the present time. In the event that Allen J. Beermann determines that these petitions do not reflect a satisfactory level of community support for the candidacy of Eugene J. McCarthy and makes such determination in good faith and finds there is no other method by which to determine whether Eugene J. McCarthy maintains such a level of support, the said Allen J. Beermann need not place the name of Eugene J. McCarthy on the ballot. On the other hand, if said

Allen J. Beermann determines that the petitions do reflect sufficient level of community support for the candidacy of Eugene J. McCarthy, he is then to place the name Eugene J. McCarthy on the ballot as an independent candidate for the office of the President of the United States. In the event that the Secretary of State finds that Eugene J. McCarthy's name should be on the ballot, he shall process the ballots in the same manner as he would any other candidate properly certified for the office of the President of the United States in the November, 1976, general election, as the laws of Nebraska now direct.

In the event that Eugene J. McCarthy is a successful candidate for the office of the President in the November, 1976, general election, after a proper canvass of the vote as set forth by 32-4,104, the parties may return to this court for further direction as to proper certification of electors for the office of President of the United States.

The foregoing shall consist of findings of fact and conclusions of law in accordance with Rule 52 of the Federal Rules of Civil Procedure.

IT IS SO ORDERED.

Dated September 1, 1976.

BY THE COURT

/s/ Donald P. Lay
United States Circuit Judge

/s/ Warren K. Urbom
Chief United States District Judge

/s/ Robert V. Denney
United States District Judge

APPENDIX B—JUDGMENT

(Filed September 1, 1976)

CV76-L-166

In the United States District Court
for the District of Nebraska

EUGENE J. McCARTHY, et al.,

Plaintiffs,

vs.

THE HONORABLE J. JAMES EXON, et al.,

Defendants.

Pursuant to the accompanying memorandum,

IT HEREBY IS ORDERED AND ADJUDGED that:

1. The motion to dismiss for lack of jurisdiction is denied.

2. The defendants are given leave to file their answer *instanter.*

3. The statutory provisions of the State of Nebraska regarding elections, including Neb. Rev. Stat. 32-504 (Supp. 1974), together with 32-556, 32-561, 32-4,108 and the related sections which fail to provide a means by which an independent candidate for the office of President of the United States may obtain certification to appear on the ballot for the general election for that office, are unconstitutional to that extent.

4. The Secretary of State shall, on or before September 8, 1976, in good faith determine from the petitions now on file in his office, which allegedly contain 2,981 signatures requesting that electors who support Eugene J. McCarthy be put on the November, 1976, ballot, whether

Eugene J. McCarthy has a satisfactory level of community support to be placed on the ballot. If the Secretary cannot determine from these petitions or by any other means that Eugene J. McCarthy has a satisfactory level of community support, he need not place his name on the printed ballot nor certify the same. On the other hand, if the Secretary determines that Eugene J. McCarthy has a satisfactory level of community support, he should be placed on the ballot and be so certified as an independent candidate for the office of President of the United States. If the determination to place him on the ballot is made, the Secretary of State shall place him on the ballot in the same manner and process as any regularly certified candidate would appear, as now contemplated by existing Nebraska law.

5. In the event that Eugene J. McCarthy is a successful candidate for the office of the President in the November, 1976, general election, after a proper canvass of the vote as set forth by 32-4,104, the parties may return to this court for further direction as to proper certification of electors for the office of President of the United States.

IT IS SO ORDERED.

Dated September 1, 1976.

/s/ Donald P. Lay
United States Circuit Judge

/s/ Warren K. Urbom
Chief United States District Judge

/s/ Robert V. Denney
United States District Judge

APPENDIX C—STATUTES

32-504. *Nomination by petition; signers required; filing; notice; defeated primary candidates ineligible; acceptance of nomination; Governor and Lieutenant Governor; nominating petition; one vote at general election for both.* (1) Candidates for public offices may be nominated otherwise than by direct filing, convention, or committee in the following manner:

(a) Candidates for any municipal office in cities of the first or second class and villages, and Class II, III or VI school districts may be nominated by petition. Villages and Class II school districts may caucus for candidates as provided in section 17-601.01. Petitions shall be signed by registered voters equal in number to five per cent of the votes cast in the city or ward at the most recent municipal election, except that in Class II, III or VI school districts the candidates may be nominated by a petition signed by not less than five per cent of the total number of votes cast at the last election in the district; *Provided,* not less than twenty-five signatures of registered voters of the district when the nomination is for an election in a Class II or VI school district, or not less than fifty signatures of registered voters of the district when the nomination is for an election in a Class III school district shall be required. The form of such petitions shall be prescribed by the Secretary of State. Such petitions shall be filed with the county clerk, election commissioner, or city clerk. The deadline for filing such petitions shall be sixty days prior to the statewide primary election. Any candidate whose petition is valid and sufficient shall have his name certified to the proper election official to be placed upon the ballot; and

(b) As to candidates for other elective public offices not appearing on the nonpolitical ballot, except presidential and vice presidential candidates, petitions for nomination, containing the name of the office to be filled and stating the name, residence, business, and post-office address of the candidate, shall be signed by registered voters residing in the district or political subdivision in which the officer is to be elected and filed with the county clerk, the election commissioner, or the Secretary of State. Petition signers and petition circulators shall be at least the constitutionally prescribed age of an elector, shall reside in the state, be a citizen of the United States, and a registered voter; *Provided,* that no petition for nomination shall be filed unless there is attached thereto a proper county treasurer's receipt from the county of such nominee's residence showing the payment of the same filing fee as is required of candidates for the same office in the primary election. Such petitions must be filed at least seventy days prior to the general election. Within ten days after the petitions have been filed with the county clerk, election commissioner or Secretary of State, the candidate shall file with the appropriate official, a statement in writing accepting the petition candidacy. The number of signatures shall not be less than two thousand when the nomination is for an office to be filled by the electors of the entire state; twenty per cent of the total vote for Governor or for President at the last general election within the county or other subdivision of the state, not to exceed two thousand signatures, when the nomination is for an office to be filled by the electors of a county or other subdivision less than the state except a township or precinct; and not less than fifty when the nomination is for an office

to be filled by the electors of a township or precinct; *Provided,* the number of signatures need not in any instance exceed one-fourth of the total number of voters therein at the last preceding election when the nomination is for any office to be filled by the electors of a county, township or precinct, and the signatures need not all be appended to one paper.

(2) In the event of petition filings for the office of Governor and Lieutenant Governor for election as provided by Article IV, section 1, of the Constitution of Nebraska the following procedures shall be followed:

(a) Each of the candidates for the office of Governor and Lieutenant Governor circulating or having petitions circulated in his or her behalf after the primary election and prior to the general election shall prior to the circulation of such petition or petitions select the person whom he or she wishes to be his or her team member for ballot purposes. Two thousand signatures on the petition or petitions carrying the names of the candidates for Governor and Lieutenant Governor shall be sufficient for the placing of both names jointly on the general election ballot. Beneath the names of the candidates for Governor and Lieutenant Governor nominated at a primary election by party and beneath the names of all candidates for Governor and Lieutenant Governor placed on the general election ballot by petition there shall be two write-in lines provided enclosed with brackets with one square to the left in which the voter may write the names of the candidates of his choice. The name appearing on the top line will be considered to be the candidate for Governor and the name appearing on the second line shall be considered to be the

candidate for Lieutenant Governor and the vote cast jointly for the persons whose names are so written shall be counted even though not marked as if printed on the ballot. If an elector chooses to use the write-in provision for casting a joint ballot for the Governor and Lieutenant Governor of his or her choice, he shall write in the name of his or her choice for Governor and the name of his or her choice for Lieutenant Governor and in the case of the omission of a name for Governor or for Lieutenant Governor under this provision, the counting board shall reject that portion of the ballot pertaining to the offices of Governor and Lieutenant Governor; and

(b) At the general election one vote shall be cast jointly for the candidates for Governor and Lieutenant Governor whose names appear on the same petition or petitions. The candidates shall be termed candidates by petition, and their names shall be placed on the ballot beneath the names of all other candidates placed there by nomination and there shall be printed after such names the words By petition.

(3) No person who has been a candidate for an office at a primary shall be a candidate by petition for the office for which he was defeated, at the next general election.

(4) Candidates, nominated under the provisions of subdivision (1) (b) of this section, shall be termed candidates by petition, and upon the ballot upon which their names are printed shall be printed after such names the words By petition.

(5) Each elector, signing a petition under the provisions of subdivision (1) (b) of this section, shall add to his signature his city, village, or post-office address, and his street and street number or his voting precinct.

(6) Petitions for nomination for all county, district, or precinct offices, under the provisions of subdivision (1) (b) of this section, shall be filed with the county clerk or election commissioner of the respective counties wherein the officers are to be elected, or with the Secretary of State.

(7) Within twenty-four hours after the receipt for filing of a petition for nomination as provided for by subdivision (1) (a) or subsection (6) of this section, the filing officer shall notify by either registered or certified mail the candidate so nominated, who shall, within five days from the date of filing of such petition for nomination, file with such officer his acceptance of the petition for nomination or his name shall not be printed on the election ballot unless otherwise provided by law.

32-556. *Post-primary state conventions; when held; organization; platform.* Each of the various political parties shall hold a delegate state post-primary convention biennially on a date to be fixed by the state central committee but not later than October 1. Such convention shall nominate candidates for such elective state offices as are excepted from the operation of the direct primary law. Such nominations shall be certified to the Secretary of State by the presiding officer and the secretary of the convention, as such, which certificates shall have the same force and effect as nominations in primary elections, and shall be treated accordingly. The convention shall formulate and promulgate a state platform, select a state central committee and select electors for President and Vice President of the United States, the names of whom shall be certified to the Governor and Secretary of State by the

officers of such convention. The state convention shall exercise such powers as ordinarily vest in conventions and shall transact such business as shall properly come before it.

32-561. *President and Vice President; candidates; certification of names and addresses; time; Secretary of State; place names on ballot.* At least sixty days prior to any general election at which candidates for President and Vice President are to be voted upon by the electors of the state, the appropriate officers of the various national political conventions shall certify the names and addresses of such candidates selected by convention to the Secretary of State. The Secretary of State shall then take appropriate steps to place the names of the presidential and vice presidential candidates on the ballot in accordance with provisions of law.

32-4,108. *Board of state canvassers; time and place of meeting; determine candidates nominated or elected; declare measures carried.* The board of state canvassers shall meet at the office of the Secretary of State on the fourth Monday after each primary and general election. If all the returns have not been received at the office of the Secretary of State, and the tabulation of votes completed, the board may adjourn from day to day until the same shall have been received and tabulated. The state board of canvassers shall determine from the completed abstract the names of those candidates who have been nominated or elected. It shall also declare those measures carried if such measures have received the required percentage of votes as provided by law. The abstract shall be signed by the canvassers in their official capacity as

state canvassers and have the seal of the state affixed. The signed abstract of votes from the various counties shall be filed in the office of the Secretary of State.

§ 1343. *Civil rights and elective franchise*

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote. June 25, 1948, c. 646, 62 Stat. 932; Sept. 3, 1954, c. 1263, § 42, 68 Stat. 1241; Sept. 9, 1957, Pub.L. 85-315, Part III, § 121, 71 Stat. 637.

§ 2201. *Creation of remedy*

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. June 25, 1948, c. 646,

62 Stat. 964; May 24, 1949, c. 139, § 111, 63 Stat. 105; Aug. 28, 1954, c. 1033, 68 Stat. 890; July 7, 1958, Pub.L. 85-508, § 12 (p), 72 Stat. 349.

§ 2281. *Injunction against enforcement of State statute; three-judge court required*

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. June 25, 1948, c. 646, 62 Stat. 968.

§ 2284. *Three-judge district court; composition; procedure*

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days notice of the hearing shall be given to the governor and attorney general of the State.

If the action involves the enforcement, operation or execution of an Act of Congress or an order of any department or agency of the United States, at least five days' notice of the hearing shall be given to the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.

Such notice shall be given by registered mail or by certified mail by the clerk and shall be complete on the mailing thereof.

(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the

trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State. June 25, 1948, c. 646, 62 Stat. 968; June 11, 1960, Pub.L. 86-507, § 1 (19), 74 Stat. 201.

§ 1983. *Civil action for deprivation of rights*

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

R.S. § 1979.

§ 1985. *Conspiracy to interfere with civil rights—Preventing officer from performing duties*

(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

Obstructing justice; intimidating party, witness, or juror

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to

enforce, the right of any person, or class of persons, to the equal protection of the laws;

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

R.S. § 1980.

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-492

J. JAMES EXON, Governor of the State of Nebraska, and ALLEN J. BEERMANN, Secretary of State of the State of Nebraska,
Appellants,

v.

EUGENE J. McCARTHY, HARRY G. MENDELSON, EDWIN H. GARRISON, JR., PAT L. WATKINS and MALCOLM W. PAINE,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

ANSWER TO JURISDICTIONAL STATEMENT

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INDEX

TABLE OF CONTENTS

Page

Motion to Affirm Decision Below and for Reasonable Fees and Costs 1

Opinion Below 2

Jurisdiction 2

Statutes Involved 2

Questions Presented 2

Statement of the Case 2

Argument:

V. This Court Should Award Reasonable Fees and Costs. 4

TABLE OF CITATIONS

Cases

Alyeska Pipeline Service v. Wilderness Society, 421 US 240, 44 L.Ed. 2d 141 (1975) 4

McCarthy v. Brisco, No. A-247, Oct. 1, 1975, 45 USLW 3244 (30 September 1976). 4

Scheuer v. Rhodes, 416 US 232, 40 L.Ed. 2d 90 (1974). 3,5

Sterling v. Constantin, 287 US 378, 77 L.Ed. 575 (1932). 3

Storer v. Brown, 415 US 724, 39 L.Ed. 2d 714 (1974). 3,4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-492

J. JAMES EXON, Governor of the State of Nebraska, and ALLEN J. BEERMANN, Secretary of State of the State of Nebraska,

Appellants,

v.

EUGENE J. McCARTHY, HARRY G. MENDELSON, EDWIN H. GARRISON, JR., PAT L. WATKINS and MALCOLM W. PAINE,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

ANSWER TO JURISDICTIONAL STATEMENT

MOTION TO AFFIRM DECISION BELOW AND FOR REASONABLE FEES AND COSTS

Appellees move this Honorable Court, pursuant to Rule 16 (1) (c), to affirm summarily the judgment of the U.S. District Court for Nebraska on the grounds that the legal positions of the Appellants are contrary to settled law in this Court, that there is no basis for the Appellants' attempted

defense of a legal provision this Court has characterized as an "inconceivable policy," and to award reasonable attorneys fees and costs to attorneys for Appellees.

OPINION BELOW

The opinion below of the three-judge Court has been provided by the Appellants in their Jurisdictional Statement.

JURISDICTION

Appellees agree that this Court has jurisdiction, as set forth by Appellants.

STATUTES INVOLVED

Appellees agree with the statement of Statutes Involved by Appellants.

QUESTIONS PRESENTED

Appellees submit on the four questions presented by the Appellants, but add a fifth question:

5. Where, as here, Appellants raise a legal position with settled law contrary, with knowledge on the record of that law, and with no realistic possibility of success, should attorneys' fees and costs be awarded on *per curiam* affirmance?

STATEMENT OF THE CASE

Appellees adopt the Appellants' Statement of the Case.

ARGUMENT

It has been settled law for 68 years in this Court that a citizen may sue state officials in federal court under circumstances such as those present here.

> "[S]ince Ex parte Young, 209 US 123, 52 L.Ed. 714, 28 S.Ct. 441 (1908), it has been settled that the Eleventh Amendment provides no shield for a state official confronted by a claim that he had deprived another of a federal right under the color of state law."

Scheuer v. Rhodes, 416 US 232, at 237; 40 L.Ed. 2d 90, at 97 (1974). The extensive quotation from *Young* in *Scheuer, ibid*, and from *Sterling v. Constantin*, 287 US 378, 77 L.Ed. 575 (1932) at *id*, US pps. 248-249; L.Ed., pps. 103-104, make it crystal clear that the position of the Appellants, here, on immunity, is totally incorrect.

Scheuer, which Appellants cite in their Statement, at p. 8, is the latest and most comprehensive statement on this question. Immediately after the statement in *Scheuer* which sets forth the Appellants' general position, and *on the same page*, appear the references to *Young* and *Sterling*, which show that the Appellants are within the exception of this general rule. Since the Appellants cited *Scheuer*, they either read it or are presumed to have read it, and are aware of the law on immunity.

The substantive law on the arbitrary exclusion of an independent candidate for president from any state ballot is equally clear. The Court below cited the leading case on point, *Storer v. Brown*, 415 US 724, 39 L.Ed. 2d 714 (1974). While

there was a dissent in *Storer* as to the remedy, this Court should note there was neither dissent nor any mental reservation whatever that a state may not constitutionally compel an independent candidate to become a party man in order to qualify for the ballot. California only advanced the contrary to that as an alternative argument in *Storer*. In the instant case, the Nebraska statutes flatly prohibit an independent candidacy for president.

It was precisely such a position that this Court agreed was an "inconceivable policy", in *McCarthy v. Briscoe*, 45 USLW 3244 (30 Sept. 1976). See also the cases there cited from Florida and Delaware.

The Appellants' questions I to IV are jointly and fully answered by the above discussion, and cases there cited. The last question regards fees and costs.

V.

THIS COURT SHOULD AWARD REASONABLE FEES AND COSTS.

This Court has seen, in its own docket, the tip of the iceberg of the litigation brought by many attorneys, in many jurisdictions, on many issues, on behalf of Senator McCarthy. In the midst of these efforts, some of his attorneys were compelled to set aside pressing, and legitimately contested matters, in order to answer the statement of Appellants.

The latest (and most comprehensive) statement on the award of attorneys' fees and costs in federal courts is found in *Alyeska Pipeline Service v. Wilderness Society*, 421 US 240, 44

L.Ed.2d 141 (1975). The exception to the "American Rule" of not allowing attorneys' fees and costs which applies here, is when a party makes a totally untenable argument, discriminates, is obdurate, or acts for purposes of delay or harrassment only.

Appellees ask the Court to determine whether the Appellants have appealed with no semblance of just cause. If so, Appellees request that reasonable fees and costs be awarded against the individual Appellants, pursuant to *Scheuer, supra.*

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IN THE

Supreme Court of the United States

No. 76-492

J. JAMES EXON, Governor of the State of Nebraska, and ALLEN J. BEERMANN, Secretary of State of the State of Nebraska,

Appellants,

vs.

EUGENE J. McCARTHY, HARRY G. MENDELSON, EDWIN H. GARRISON, JR., PAT L. WATKINS and MALCOLM W. PAINE,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

BRIEF IN OPPOSITION TO APPELLEES' MOTION FOR SUMMARY AFFIRMANCE

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INDEX

Cases Cited

Page

Edelman v. Jordan, 415 U. S. 651, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974) ---------- 3, 5

Employees v. Missouri Public Health Department, 411 U. S. 279, 36 L. Ed. 2d 251, 93 S. Ct. 1614 (1973) - 3

Fitzpatrick v. Bitzer, —— U. S. ——, 49 L. Ed. 2d 614, 96 S. Ct. —— (1976) ---------- 5, 6, 7

Hawaii v. Gordon, 373 U. S. 57, 10 L. Ed. 2d 191, 83 S. Ct. 1052 (1963) ---------- 2, 7

Larson v. Domestic and Foreign Commerce Corporation, 337 U. S. 682, 93 L. Ed. 1628, 69 S. Ct. 1457 (1949) ---------- 2, 7

Monroe v. Pape, 365 U. S. 167, 5 L. Ed. 2d 492, 81 S. Ct. 473 (1961) ---------- 6

Parden v. Terminal Railroad Co., 337 U. S. 184, 12 L. Ed. 2d 233, 84 S. Ct. 1207 (1964) ---------- 3

United States v. Mississippi, 380 U. S. 128, 15 L. Ed. 2d 717, 85 S. Ct. 808 (1965) ---------- 3

Statutes Cited

42 U. S. C., § 1983 ---------- 4, 6

42 U. S. C., § 1985 ---------- 6

Title VII, Civil Rights Act of 1964 ---------- 5, 6

Constitutions Cited

Constitution of the United States, Eleventh Amendment ---------- 2, 4, 5

Constitution of the United States, Fourteenth Amendment ---------- 4

Constitution of the United States, Fourteenth Amendment, Section 5 ---------- 5, 6

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An examination of the arguments presented by the appellees in support of their motion for summary affirmance reveals that they have totally misconstrued the argument presented by the appellants in the Jurisdictional Statement.

Governor Exon and Secretary of State Beermann are not contending that the action should have been dismissed as a result of *their* immunity but rather that the action should have been dismissed in that it was in reality an ac-

tion against the sovereign State of Nebraska and therefore in contravention of the Eleventh Amendment to the Constitution of the United States.

It is the appellants' position that this contention must be evaluated through an analysis of a separate and distinct progression of precedence from that which has developed concerning the doctrine of official immunity. Therefore, in light of the nature of the argument made and precedence cited in support of the appellees' motion for summary affirmance the following precedential analysis is offered as a clarification of the appellants' position advanced in the Jurisdictional Statement.

In 1949 this Court in the case of *Larson v. Domestic and Foreign Commerce Corporation*, 337 U. S. 682, 93 L. Ed. 1628, 69 S. Ct. 1457, held that a suit may fail as being one against the sovereign even if it is claimed that the officers being sued acted unconstitutionally or beyond their statutory powers. This Court indicated that such would be the case in situations where:

> ". . . the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property. . . ." (93 L. Ed. at 1636, Note 11.)

Additionally in 1963 this Court made reference to this "affirmative action analysis" in *Hawaii v. Gordon*, 373 U. S. 57, 10 L. Ed. 2d 191, 83 S. Ct. 1052, wherein it was stated:

> ". . . The general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter. . . ." (10 L. Ed. 2d at 192.)

In the *Hawaii* case the order sought would have required

affirmative action on the part of a governmental officer.

In 1973 this Court decided the case of *Employees v. Missouri Public Health Department*, 411 U. S. 279, 36 L. Ed. 2d 251, 93 S. Ct. 1614. In this case employees of the Missouri Department of Public Health and Welfare sued the State of Missouri to recover overtime compensation due them under the Federal Fair Labor Standards Act plus an equal amount as liquidated damages and attorneys fees. This Court was faced with the question of whether or not the Congress of the United States had lifted Missouri's sovereign immunity by enacting the Fair Labor Standards Act. This Court concluded that there was nothing within that Act which would lead them to believe that Congress, by the enactment of that legislation, had relieved the State of Missouri of its sovereign immunity.

This Court in *Employees, supra*, was careful to point out however that such a holding did not result in the parties being without a remedy. This Court made reference to the fact that the Fair Labor Standards Act made provisions for the Secretary of Labor enjoining violations of the Act and obtaining restitution on behalf of the employees such actions by the United States against a state not being barred by the Constitution. *United States v. Mississippi*, 380 U. S. 128, 15 L. Ed. 2d 717, 85 S. Ct. 808 (1965).

This Court in 1974 took the opportunity to reassess the position taken in *Employees v. Missouri Public Health Department, supra*, and the earlier case of *Parden v. Terminal Railroad Co.*, 337 U. S. 184, 12 L. Ed. 2d 233, 84 S. Ct. 1207 (1964). *Edelman v. Jordan*, 415 U. S. 651, 39 L. Ed. 2d 662, 94 S. Ct. 1347, concerned a suit involving a federal-state program to aid the aged, blind and disabled in which it was alleged that the state officials were administering the program in a manner inconsistent with the pertinent

federal regulations and with the Fourteenth Amendment. This Court held that a federal court's remedial power consistent with the Eleventh Amendment was necessarily limited to prospective injunctive relief. This Court further held that the state by participating in this joint program had not waived its sovereign immunity under the Eleventh Amendment. Specifically as to the question of waiver, this court held:

> ". . . In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.' Murray v Wilson Distilling Co., 213 US 151, 171, 53 L Ed 742, 29 S Ct 458 (1909). . . ." (39 L. Ed. 2d at 678.)

In this case Justice Marshall argued in dissent that although the Social Security Act itself did not create a private cause of action, 42 U. S. C., § 1983, coupled with the enactment of the federal program and the issuance by the Department of Health, Education and Welfare of regulations, created a cause of action for the plaintiffs. With respect to this argument this Court held:

> ". . . It is, of course, true that Rosado v Wyman, 397 US 397, 25 L Ed 2d 442, 90 S Ct 1207 (1970), held that suits in federal court under §1983 are proper to secure compliance with the provisions of the Social Security Act on the part of participating States. [footnote omitted]. But it has not heretofore been suggested that § 1983 was intended to create a waiver of a State's Eleventh Amendment immunity merely because an action could be brought under that section against state officers, rather than against the State itself. Though a §1983 action may be instituted by public aid recipients such as respondent, a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief, [citation omitted]. . ." (39 L. Ed. 2d at 679, 680.)

This Court most recently in the case of *Fitzpatrick v. Bitzer,* —— U.S. ——, 49 L. Ed. 2d 614, 96 S. Ct. ——, (1976), reviewed the decision handed down in *Edelman, supra,* and specifically stated:

> ". . . the plaintiffs in [Edelman] . . . could not avail themselves of the doctrine of waiver expounded in cases such as Parden v. Terminal R. Co. [citation omitted], and Employees v. Department of Public Health and Welfare, [citation omitted], because the necessary predicate for that doctrine was congressional intent to abrogate the immunity conferred by the Eleventh Amendment. We concluded that none of the statutes relied upon by plaintiffs in Edelman contained any authorization by Congress to join a State as defendant. . . ." (49 L. Ed. 2d at 618, 619.)

Fitzpatrick, supra, concerned the 1972 amendments to Title VII of the Civil Rights Act of 1964. Congress acting under Section 5 of the Fourteenth Amendment had authorized federal courts to award money damages in favor of private individuals against the state government which subjected a person to employment discrimination. The question before this Court there was whether or not the holding in *Edelman, supra,* foreclosed such an exercise of power by Congress.

This Court distinguished its previous holdings by indicating that none of those cases presented the question of the relationship between the Eleventh Amendment and the enforcement power granted the Congress under Section 5 of the Fourteenth Amendment.

This Court concluded that the Eleventh Amendment and the principle of state sovereign immunity which it embod-

ies is necessarily limited by the enforcement provisions of Section 5 of the Fourteenth Amendment. This Court held that since Congress had *specifically* acted by authorizing suits against state government in cases of employment discrimination in the 1972 amendments to Title VII of the Civil Rights Act of 1964, that the relief sought could, under these limited circumstances, be granted.

It would appear then from the foregoing review that the resolution of the issues presented herein would initially be controlled by this Court's holding in *Fitzpatrick, supra,* rather than the holdings of this Court concerning official immunity.

It is the position of the appellants that a determination of the applicability of the bar to jurisdiction found in the Eleventh Amendment involves a two-fold analysis. First, a determination as to the existence of specific congressional authorization for such an action and second in the absence of such a finding, a determination as to whether or not the action is one against the named state officers as individuals or is in reality an action against the sovereign.

The complaint filed herein made no reference to any such authorization and alleged only general constitutional violations. The only substantive jurisdiction alleged was 42 U. S. C. § 1983 and § 1985. However, as this Court pointed out in *Monroe v. Pape,* 365 U. S. 167, 5 L. Ed. 2d 492, 81 S. Ct. 473 (1961), the Civil Rights Act was not intended to include states as parties defendant.

It is contended that no such specific congressional authorization enacted pursuant to Section 5 of the Fourteenth

Amendment can be established such as to satisfy the requirements of *Fitzpatrick, supra.*

Therefore, since Congress has not specifically authorized the relief sought, the protection of the Eleventh Amendment to the United States Constitution is available to the appellants in this action if in fact it is an action against the state and not an action against the Governor and Secretary of State as individuals.

Applying the standards set by this Court in *Larson v. Domestic and Foreign Commerce Corporation, supra,* and *Hawaii v. Gordon, supra,* it is clear that the relief sought required affirmative action on the part of the sovereign in that the complaint did not seek compensation for alleged wrongs, but rather the initiation by the Court of a procedure whereby Mr. McCarthy might achieve placement upon the Nebraska Presidential Election ballot.

This is not an action against these named individuals for deprivations of constitutional rights for which they as individuals were responsible. This was an action against the sovereign State of Nebraska as a result of the state's failure to provide a means whereby an independent candidate for the office of President of the United States might achieve placement upon the Nebraska General Election ballot. Therefore, it is concluded that this case presents a substantial federal question.

CONCLUSION

Therefore the appellants' motion for summary affirmance and for reasonable fees and costs should be denied

and this Court should note probable jurisdiction, accept the cause for plenary consideration and reverse the judgment of the United States District Court for the District of Nebraska.

Respectfully submitted,

J. JAMES EXON, Governor of the State of Nebraska, and ALLEN J. BEERMANN, Secretary of State of the State of Nebraska
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